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16 **UNITED STATES DISTRICT COURT**
17 **CENTRAL DISTRICT OF CALIFORNIA**

18 Alice Vysata

19 Plaintiff and Counterdefendant,

20 v.

21 Marc Menowitz, et al.,

22 Defendants & Counterclaimants.

CASE NO.: 18-cv-06157-JAK-RAO

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO QUASH SUBPOENAS TO
NON-PARTIES AUDREY YEBOAH
AND SKYLINE FINANCIAL CORP.**

Date: March 6, 2019

Time: 8:30 a.m.

Courtroom: 10B

Judge: Hon. Rozella A. Oliver

Discovery Cutoff: June 17, 2019

I. INTRODUCTION AND BACKGROUND

a. Subpoenas to Audrey Yeboah

² (Figari Decl., ¶¶ 2). Defendants' counsel has not responded to Plaintiff's counsel's request of Jan. 25 asking about when the subpoenas were served. But in response to Plaintiff's counsel's Jan. 22 and Jan. 23 emails to Defendants' counsel asking for a meet and

1 February 4. (Ahluwalia Decl. at ¶ 5, Ex. 1-3 thereto). Ms. Yeboah, in addition to being
2 Plaintiff's former accountant, also happens to be Defendant ARA's employee/bookkeeper
3 and Defendant Marc Menowitz's personal accountant. Indeed, Ms. Yeboah became
4 Plaintiff's accountant when Plaintiff started working for Defendants and at the suggestion of
5 Defendant Marc Menowitz. During the course of this litigation, without Plaintiff's consent
6 or permission and without notice to Plaintiff, Ms. Yeboah apparently delivered a declaration
7 signed June 21, 2018 to Defendants' counsel, Mr. Kenneth Chase, divulging confidential,
8 privileged information contained in Ms. Vysata's personal financial records, which Ms.
9 Yeboah gained access to either as her personal accountant or as Defendants' bookkeeper.
10 (Dkt. No. 14-6; p.10).
11

12 Defendants have now also issued *two separate subpoenas* to Audrey Yeboah on the
13 same day with the same date of compliance. (Ex. 1-2 to Ahluwalia Decl.). One subpoena
14 asks for "[a]ll state and federal tax returns for Alice Vysata between 2011 and the present
15 time" as well as "[a]ll documents reflecting or comprising communications with Alice
16 Vysata between 2011 and the present time." (Ex. 1 to Ahluwalia Decl.). The second
17 subpoena states, "Regarding Alice Vysata, all W-9s, W-2s and 1099s and documents
18 indicating whether Vysata declared herself as an employee" and "Regarding Alice Vysata,
19 all documents pertaining to geographic locations of her offices, her business expenses and
20 her sources of income." (Ex. 2 to Ahluwalia Decl.).
21

22 There is pending litigation in Florida State Court between the same parties (*see* Dkt.
23 No. 54 (Judge Kronstadt's order denying Defendants' motion to join the cases). (Ahluwalia
24 Decl. at ¶ 6). Defendants have issued an out of state subpoena to Ms. Yeboah in the Florida
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28 confer prior to the service of the subpoenas, Mr. Chase responded on Jan. 23 stating, "The
subpoenas have been issued pursuant to Rule 45." (Figari Decl., ¶¶2- 4).

1 state court action as well, for the same records as those sought in Exhibit 2. A petition to
2 quash the out of state (Florida) subpoena filed by Plaintiff is pending in Los Angeles
3 Superior Court. (Ahluwalia Decl. at ¶ 7). Defendants claimed, in the meet and confer effort
4 regarding the Florida Yeboah subpoena for the same records, that they are entitled to *all* of
5 Plaintiff's tax returns and financial documents because they claim such documents will
6 show that Plaintiff always classified herself as "self-employed" in her tax returns and
7 therefore, cannot have been an employee. (Ex. 4 to Ahluwalia Decl.). Defendants failed to
8 meet and confer as to the subpoena issued pursuant to Fed R. Civ. P. 45.

10 ***b. Subpoenas to Skyline Financial Corp.***

11 Defendants' subpoena to Skyline Financial Corp. is similarly objectionable. Skyline
12 Financial Corp. is a mortgage company that Vysata used to buy a home. Defendants seek records
13 in violation of Plaintiff's right to privacy. They seek, "all documents received from Alice
14 Vysata"... regarding the mortgage loan made to borrower Alice Vysata and/or borrower Karl
15 Katterin for the property located at 1824 Eagle Crest Drive, Port Orange, FL 32128." (Ex. 3 to
16 Ahluwalia Decl.). All documents submitted by Ms. Vysata to a company providing her a
17 mortgage necessarily includes tax returns, financial documents, and other documents protected
18 by Plaintiff's right to privacy.

20 **II. PLAINTIFF MADE SIGNIFICANT ATTEMPTS TO MEET AND**
21 **CONFER WITH DEFENDANTS PRIOR TO FILING THIS MOTION.**

22 Plaintiff objected to the scope and purpose of the subpoenas and attempted to meet and
23 confer via telephone. (*See* Figari Decl.). The parties have also discussed the issue of the Audrey
24 Yeobah subpoenas over the phone and over email when the same were previously issued.
25 (Ahluwalia Decl. at ¶ 8).

1 Defendants argued that the subpoenas to Yeboah are proper because they will show that
2 Plaintiff was a “self-employed person and not an employee of ARA and Menowitz” by showing
3 that she classified herself as self-employed, that she deducted business expenses (“[s]elf-
4 employed people take these deductions and your client was a self-employed person”), and that
5 she had multiple sources of income. (Ex. 4 to Ahluwalia Decl.)
6

7 In turn, Plaintiff has indicated to Defendants that a wholesale subpoena for all records
8 and communications in the possession of Plaintiff’s former accountant is not permissible nor
9 necessary to get the information that Defendants seek. First, Plaintiff’s tax returns are privileged
10 under California law and cannot be subpoenaed without the requisite showing by Defendants
11 overcoming the privilege. Second, as to the need for the records to show that Plaintiff classified
12 herself as self-employed, Plaintiff offered the following to Defendants: “[] we would consider
13 stipulating as to how she classified herself for income tax purposes if you indicate what box or
14 line you are referring to on an income tax return that allows for such determination.” (Ex. 5 to
15 Ahluwalia Decl.). The information that Defendants claim they need from the tax returns to show
16 that Plaintiff was an independent contractor is not in dispute. Plaintiff has explained to
17 Defendants that Plaintiff’s tax returns, like any other individual who is misclassified as an
18 independent contractor, will be filed in accordance with whether the *employer* has given the
19 worker a W-2 or 1099. A wholesale disclosure of plaintiff’s privileged information, therefore, is
20 not necessary to uncover a basic fact that will not be in dispute in this litigation.
21

22 Similarly, Defendants claim that if the tax returns show that Plaintiff deducted business
23 expenses, it will be further proof that she was an independent contractor. However, Plaintiff has
24 never alleged that she did not deduct business expenses on her tax returns, nor has she refused to
25 state so in a properly propounded discovery request. Again, Defendants’ subpoenas for all
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1 documents relating to Plaintiff in the possession of her former accountant are not limited to
2 whether and what business expenses she claimed on her tax returns.

3 These documents have little or no relevance to the claims and defenses in the instant
4 lawsuit, and they are certainly not directly relevant or essential to a fair resolution of this lawsuit.
5 they can obtain private financial and personnel materials sought through the subpoenas at issue
6 in this motion. Defendants, to date, have not met that standard.
7

8 **III. LEGAL STANDARD**

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10 Under Federal Rule of Civil Procedure 45(a)(1)(c), any party may serve a subpoena
11 commanding a nonparty “to attend and give testimony or to produce and permit inspection and
12 copying of” documents. Fed. R. Civ. P. 45(a)(1)(C). The subpoena may command the
13 production of documents which are “not privileged” and are “relevant to the subject matter” or
14 “reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).
15 Absent a showing of good cause, discovery is limited to matter relevant to the claims or defenses
16 of the parties, rather than the “subject matter” of the action. *See Elvig v. Calvin Presbyterian*
17 *Church*, 375 F.3d 951, 968 (9th Cir. 2005). Upon a timely motion, the court issuing such a
18 subpoena shall quash it if it determines that the subpoena “requires disclosure of privileged or
19 other protected matter and no exception or waiver applies.” Fed. R. Civ. P. 45(c)(3)(A)(iii).
20

21 In a pure diversity case, such as this case, State law governs interpretation of substantive
22 matters, including privilege. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80, (1938); see also
23 *Platypus Wear, Inc. v. K.D. Co., Inc.*, 905 F. Supp. 808, 811 (S.D. Cal. 1995) (state law governs
24 law of privilege in diversity case).
25

26 **IV. THE RECORDS SOUGHT IN DEFENDANTS’ SUBPOENAS TO AUDREY**
27 **YEBOAH ARE WHOLLY PROTECTED FROM DISCLOSURE BY THE PRIVILEGE**
28 **PROTECTING TAX RETURNS AS RECOGNIZED BY CALIFORNIA COURTS, AND**
THE SUBPOENAS MUST BE QUASHED.

1
2 Defendants have served subpoenas for not only Plaintiff's W-2s, W-9s, 1099s, but
3 literally "[a]ll documents reflecting or comprising communications with Alice Vysata
4 between 2011 and the present time." (Ex. 1 to Ahluwalia Decl.). Defendants' assertion that
5 "...there is no "strong privacy interest" here. Your client put her own finances at issue in a junk
6 claim for damages" (Ex. 4 to Ahluwalia Decl.) is without merit. Defendants subpoenas to
7 Audrey Yeboah seek information protected by the tax-payer privilege recognized in California.

8 California recognizes a privilege protecting tax returns from disclosure. (*Webb v.*
9 *Standard Oil Co.* 49 Cal.2d 509, 513 (1957)). This privilege is characterized by the courts as
10 "very strong," and the exceptions are narrow. (*See e.g., Davis v. Leal*, 43 F.Supp.2d 1103, 1109
11 (E.D. Cal. 1999) ("California law affords a very strong privilege from discovery of tax
12 records."); *Fortunato v. Superior Court*, 114 Cal.App.4th 475, 483 (2003); *Ameri-Medical Corp.*
13 *v. Workers' Comp. Appeals Bd.*, 42 Cal.App.4th 1260, 1289 (1996) (tax returns are not
14 discoverable); *Schnabel v. Superior Court*, 5 Cal.4th 704, 718-721(1993); *Webb v. Standard Oil*
15 *Co.*, 49 Cal.2d 509, 512-514 (1957). Not only are tax returns protected by a specific privilege,
16 but they are also protected under a privacy privilege, which is itself guarded by the courts. (*Davis*
17 *v. Leal, supra*, 43 F.Supp.2d at 1110-1111; *Fortunato v. Superior Court, supra*, 114 Cal.App.4th
18 at 480).

19
20 A privilege applies to tax returns because they contain a significant amount of private
21 information, as to not only the taxpayer but also all other members of his or her household,
22 including information as to marital status, dependents, members of a household, custody
23 arrangements, alimony, disabilities of a household member, unemployment income, charitable
24 contributions, medical expenses, relocation expenses, gambling losses or winnings, investment
25 income or losses, social security benefits, health insurance, IRA contributions or withdrawals,
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1 home purchases or sales, etc. None of this highly private information is in any way whatsoever
2 related to any issue in this case.

3 Defendants have claimed the tax returns are relevant to show that Plaintiff was an
4 independent contractor and not an employee. They claim that whether she claimed business
5 expenses as tax deductions and obtained the resulting benefit of them, as would be expected of
6 an independent contractor, or filed tax returns more reflective of an employment relationship,
7 will bear directly on the issue of the independent contractor/employee question. However,
8 Defendants' arguments lack merit. When an employer gives a worker a 1099, that person has no
9 choice as to whether to file a tax return as an independent contractor. The worker does not
10 "classify herself" in any manner. The employer determines the status of a worker, provides either
11 a 1099 or a W-2, and the worker/employee then has no choice as to how to characterize his or
12 her status on a tax return. Almost surely will such an individual worker deduct their business
13 expenses on their tax returns. Why would a worker characterized as an independent contractor by
14 her employer, who was incurring expenses, not deduct those expenses. The deduction of business
15 expenses on a tax return has no relevance to the question of whether Plaintiff was an independent
16 contractor or employee.

17 In *Estrada v. FedEx Ground Package System, Inc.*, 154 Cal.App.4th 1, 15, n. 14 (2008),
18 the court specifically rejected the defendant's attempt to use tax returns as evidence. In that case,
19 the defendant apparently attempted to ask the plaintiffs or class members about their tax returns
20 at trial. The Court of Appeal held that the trial court had properly sustained objections to the
21 attempt to ask about tax returns. The court noted that such information is protected by the
22 taxpayer privilege, and further that the information concerning expenses incurred was obtainable
23 from other sources. (*Id.*, at 15, n. 14 (the record shows that "FedEx tried to ask witnesses about
24 information in their tax returns, and that the trial court properly sustained objections to those
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1 questions based on the taxpayer privilege and because FedEx had other means to present the
2 same information.”)

3 Similarly, in *Air Couriers International v. Employment Development Dept.*, 150
4 Cal.App.4th 923 (2007), in a case in which drivers were allegedly misclassified as independent
5 contractors, the employer argued as part of its case at trial that the drivers had filed tax returns as
6 independent contractors, and had taken business tax deductions. (*Id.*, at 927 (“Sonic issued
7 Internal Revenue Service 1099 forms to drivers that reflected the amount of compensation
8 earned for the year. Drivers reported the income earned from driving on their individual tax
9 returns and deducted expenses incurred.”). In other words, the employer tried to use the tax
10 return issue as evidence of the proper classification of the drivers. That effort was rejected, and
11 the court found the drivers to be employees, a finding that was upheld on appeal.
12

13 The underlying facts, whether in the relevant time period, Plaintiff worked for anyone
14 else as an independent contractor or employee, whether she received 1099s or W2s and from
15 whom, and whether she deducted business expenses from her taxes, are all obtainable through
16 properly propounded discovery requests. The subpoenas in question are entirely unnecessary for
17 this purpose and are certainly not limited in this way.
18

19 **V. THE RECORDS SOUGHT IN DEFENDANTS’ SUBPOENAS TO SKYLINE**
20 **FINANCIAL CORP. ARE WHOLLY PROTECTED FROM DISCLOSURE BY**
21 **PLAINTIFF’S RIGHT TO PRIVACY, AND THE SUBPOENAS MUST BE QUASHED.**

22 Similarly, by issuing a subpoena to Skyline Financial Corp., a mortgage company that
23 Vysata used to buy a home, Defendants seek records in violation of Plaintiff’s right to privacy.
24 They seek, “all documents received from Alice Vysata”...’regarding the mortgage loan made to
25 borrower Alice Vysata and/or borrower Karl Katterin for the property located at 1824 Eagle
26 Crest Drive, Port Orange, FL 32128.” (Ex. 3 to Ahluwalia Decl.). All documents submitted by
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1 Ms. Vysata to a company providing her a mortgage necessarily includes tax returns, financial
2 documents, and other documents protected by Plaintiff's right to privacy.

3 It is undisputed that "...California accords privacy the constitutional status of an
4 "inalienable right," on a par with defending life and possessing property." *Vinson v. Superior*
5 *Court* 43 Cal.3d 833, 841 (1987); California Constitution, Article I, section 1. California's
6 constitutional right to privacy has been held to operate even if a statutory privilege does not
7 protect the matter in question. *Davis v. Superior Court* 7 Cal.App.4th 1008, 1014 (1992)
8 (citations omitted). "When the right to discovery conflicts with a privileged right, the court is
9 required to carefully balance the right of privacy with the need for discovery." *Harris v. Superior*
10 *Court* 3 Cal.App.4th 661, 665 (1992). Constitutionally protected information is treated like
11 privileged information in the discovery process. "The party seeking the constitutionally protected
12 information has the burden of establishing that the information sought is directly relevant to the
13 claims." *Tylo v. Superior Court* 55 Cal.App.4th 1379, 1387 (1997).

14 In order to get beyond this "zone of privacy," the burden of proof is on Defendants to
15 show (1) that the information is essential to determining the truth of disputed matters, and (2)
16 that the information is not available from other sources or by less intrusive means. *Britt v.*
17 *Superior Court, supra*, 20 Cal.3d at p. 855-856; *Davis v. Superior Court* 7 Cal. App.4th at 1008,
18 1017 (1992). Proving that the documents sought are "essential to determining the truth of
19 disputed matters" means that the Defendant must show a particularized need for the confidential
20 information sought. *See Lantz v. Superior Court*, 28 Cal.App.4th 1839, 1854 (1994); *Britt v.*
21 *Superior Court, supra*, 20 Cal.3d at p. 859-862. Where privacy rights are concerned, direct
22 relevance is required; the assertion that documents may lead to discoverable evidence is not
23 sufficient. *Binder v. Superior Court* 196 Cal. App. 3d 893, 901 (1987).

1 Discovery of constitutionally protected information is on a par with discovery of
2 privileged information and is more narrowly proscribed than traditional discovery.” *Tylo v.*
3 *Superior Court, supra*, 55 Cal.App.4th at 1387.

4 Defendants’ subpoenas to Skyline Financial seek confidential, financial information
5 concerning a private loan that has absolutely nothing to do with this litigation. The subpoenas
6 are nothing more than a fishing expedition and must be quashed.

7
8 **VI. CONCLUSION**

9 The subpoenas to Yehboah and Skyline are either 1) intended by Defendants to
10 harass Plaintiff and deprive her of her privacy rights as retribution for filing a lawsuit against
11 them, or 2) are an attempt by Defendants to use their financial might to needlessly increase the
12 litigation costs for Plaintiff. The unlimited scope of the subpoenas means that they are not
13 reasonably calculated to elicit directly relevant and essential evidence, but rather designed to fish
14 for irrelevant, private, and *privileged* information about Plaintiff.

15
16 For all of the reasons stated herein, the Court should quash the subpoenas issued to
17 Audrey Yeboah and Skyline Financial.

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20 DATED: February 3, 2019

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22
23 /s/Mamta Ahluwalia
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